In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-234

FIRST NATIONAL BANK OF COMMERCE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 10a–21a) is reported at 438 F. 2d 809. The opinion of the district court (Pet. App. 1a–10a) is reported at 309 F. Supp. 979.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1971 (Pet. App. 22a–23a). A timely petition for rehearing was denied on March 5, 1971 (Pet. App. 24a). The petition for a writ of certiorari was filed on June 3, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly decided that, in the circumstances of the case, the defense of laches was not available to the defendant.

STATEMENT

In 1959, Raymond D. Clark, a retired government employee, instructed the Civil Service Commission to send his monthly retirement annuity checks directly to his bank for deposit in his checking account. Thereafter, the bank, petitioner herein, received the checks directly, endorsed them on behalf of Clark, and presented them to the Treasurer of the United States for payment (Pet. App. 12a). Unknown to the bank or the government, Clark died on May 20, 1965. His annuity checks, however, continued to be sent and the bank continued to present them for payment. Nearly two years later, in April 1967, Clark's heirs notified the bank that Clark had died; but the heirs apparently did not inform the bank of the date of Clark's death and the bank did not inquire about this (Pet. App. 13a). At that time, Clark's account contained $7256.22, of which $7241 represented the proceeds of the 22 checks sent since Clark died (Pet. App. 14a).

Since Clark's right to receive the payments terminated at his death (5 U.S.C. (Supp. V) 8345(c); 31 C.F.R. Part 360) the bank returned the April 1967 check to the Civil Service Commission with a notation that Clark had died. The government then stopped sending further checks. In late June the Civil Service Commission received a letter from an attorney repre-

senting Clark's heirs which noted that Clark had died in May of 1965. An application for death benefits received in mid-July contained a similar statement. (Pet. App. 2a–3a; 13a.)

In late July, without having ascertained the date of Clark's death, the bank released all the funds in Clark's account to his heirs after the heirs presented a copy of a succession judgment putting them in possession of the account (Pet. App. 13a–14a).

Meanwhile the government, not realizing that the bank did not know the date of Clark's death or that it was about to and did release funds without ascertaining this information, processed the case in the normal manner. The Office of the Treasurer, to whom the case was referred by the Civil Service Commission, assembled and identified the 22 checks in question, and in November 1967 made a formal demand on the bank for the amount of the proceeds of these checks. The bank advised that it had already turned the proceeds over to the heirs, and denied liability. The government then commenced this action against the bank for $7241 (Pet. App. 14a).

The district court granted the bank's motion for summary judgment on the ground that the government suit was barred by laches, citing *Clearfield Trust Company* v. *United States*, 318 U.S. 363. (Pet. App. 8a–9a.) The court of appeals reversed, holding that the presenting bank was clearly liable by virtue of its endorsements guaranteeing that it had unqualified authority to obtain payment of the checks on behalf of Clark, 31 C.F.R. Part 360, and that the defense of

laches was not available on the facts of this case (Pet. App. 17a, 18a–20a).

ARGUMENT

The court of appeals correctly rejected the bank's defense of laches. As the court pointed out, the bank itself "first became aware of the circumstances which bore on the negotiability of the instruments" (Pet. App. 18a). The bank had actual knowledge of the fact of its customer's death in April 1967; at that time the bank could easily have inquired about the date of death and certainly should have had this information before it released the funds in July. This case is thus unlike the alteration or forgery cases where the presenting bank has "no means of knowledge" nor "the least privity or suspicion" of the pertinent facts. See *United States Bank* v. *Bank of Georgia*, 10 Wheat. 333, 343 (fraudulently raised bank-notes of payor); *Price* v. *Neal*, 3 Burr. 1355, 1357 (drawer's signature forged).

The government did not unreasonably delay in presenting its demand. It had no reason to suspect that the bank, which informed the government of Clark's death, would be ignorant of the date of death. The government was not obligated to inform the bank that checks issued after Clark's death could not be presented to the Treasurer; indeed, the bank's return of the April 1967 check indicates that it was well aware of this. In short, the bank, not the government, failed to exercise due diligence in these circumstances, and accordingly acted at its own peril in releasing the proceeds to the heirs.

Contrary to petitioner's contention, the decision below does not conflict with *Clearfield Trust* v. *United States,* 318 U.S. 363. As the Court there stressed, the defense of laches applies only where "damage resulted" from a failure to give prompt notice; the "damage occasioned by the delay must be established and not left to conjecture." 318 U.S. at 369. In *Clearfield* the Court pointed out that so far as appeared the defending bank could recover from its endorser and thus had not shown that it had suffered damages from the government's delay. *Id.* at 370. Here, petitioner made no showing that it could not have recouped from the heirs after the government made its formal demand in November 1967. Compare *Ladd and Tilton Bank* v. *United States,* 30 F. 2d 334, 337 (C.A. 9), cited in *Clearfield, supra,* 318 U.S. at 369. The court of appeals therefore properly rejected the bank's defense of laches.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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